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No. 08-1296

In The

Supreme Court of the United States

LESLEY SIMMONS ST. GERMAIN,
HILLARY ROSE HILLYER, and
MELISSA BRANIGHAN LUMINAIS,

Petitioners,

versus

D. DOUGLAS HOWARD, JR.,
D. DOUGLAS HOWARD, JR. & ASSOCIATES,
and HOWARD & REED, ATTORNEYS AT LAW,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a plaintiff's requirement to allege criminal activity in a RICO claim obviated by the plausibility standard enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007)?

2. Is a possible ethics violation a predicate act under a RICO claim?

3. Does a district court have discretion to deny amendment if to do so would be futile?

CORPORATE DISCLOSURE

Petitioners are D. Douglas Howard, Jr., D. Douglas Howard, Jr. & Associates, and Howard & Reed, Attorneys at Law. There are no parent corporations or publicly held companies owning 10% or more of Petitioners' stock.

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STATEMENT OF THE CASE

I. Relevant Facts

Petitioners are former clients of D. Douglas Howard, Jr. ("Howard"), an attorney known within the local community as a premiere divorce attorney who aggressively protects the interest of his clients. Howard represented Hillary Hillyer ("Hillyer") in 2005-2006, Lesley St. Germain ("St. Germain") in 2006, and Melissa Luminais ("Luminais") in 2007.[1] Although Howard achieved excellent results for all petitioners, they now make the ludicrous claim that his representation of them was "a pattern of racketeering."

Petitioners argue that possible ethics violations, such as requiring a retainer, charging a monthly $20 or $30 administrative fee to cover postage and copying costs, and withdrawing from representation in accordance with the terms of their contracts, are predicate acts sufficient to maintain a RICO claim because the actions violated "substantive state law."[2] The substantive law to which petitioners refer is the Louisiana Code of Professional Conduct. During oral argument before the Fifth Circuit, however, petitioners were unable to cite any jurisprudential support for their position that a possible ethics violation is a state or federal crime. Notably, complaints filed with the Louisiana Office of Disciplinary Council

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[1] See R. at 5-6.

[2] See Petition for Writ of Certiorari, p. 5.

by one of the petitioners and another by their attorney have both been dismissed because there was no finding of even a single ethics violation. (See Dismissals attached as Appendix "A").[3]

II. Procedural History

This suit is the continuation of a vendetta against Howard by St. Germain stemming from a Suit on Open Account that he filed against her for unpaid fees.[4] Howard obtained a default judgment on the Suit in Open Account after St. Germain and her current attorney, Mark Andrews, did not timely respond.[5] St. Germain filed an untimely Answer and Defenses. St. Germain then tried to nullify the judgment against her but, because she had no legitimate grounds, the judgment stood and Howard collected his fees.[6]

St. Germain then sued Howard in Civil District Court, Parish of Orleans, alleging the exact claims of breach of contract and malpractice as in her Answer

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[3] Prior to the decision, all complaints, and the identity of the filer, to the LDC were confidential. However, in *In Re: Warner and Rando*, 05-B-1303 (La. April 17, 2009), the Louisiana Supreme Court held that the confidentiality rule imposed upon participants in an attorney disciplinary proceeding is unconstitutional.

[4] See R. at 284-304.

[5] See R. at 316.

[6] See R. at 317-321.

to Suit on Open Account.[7] Howard filed a Motion to Dismiss based upon *res judicata*.[8] St. Germain's attorney, knowing the claims had been adjudicated, asked Howard on the day of the hearing if St. Germain could dismiss her Petition. Howard allowed St. Germain to withdraw the Petition and filed a Consent Motion to Dismiss Without Prejudice which was signed on September 8, 2007.[9]

But no good deed goes unpunished. Within months, Hillyer and Luminais, who are also former clients of Howard, joined St. Germain to file in federal court a Racketeer Influenced and Corrupt Organizations ("RICO") claim and various state law claims against Howard.[10] Petitioners alleged that Howard is a racketeer who engaged in mail fraud and wire fraud because he required a retainer, charged an administrative fee, and withdrew his representation from two of the petitioners as per the terms of their contracts.[11] To keep these claims in perspective, the fees paid by each of the petitioners to Mr. Howard were $6,500, $7,653, and $12,657.[12] Respondents filed a Rule 12(b)(6) Motion to Dismiss the RICO claim because the petitioners failed to allege the essential

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[7] See R. at 305-315, 323-331.

[8] See R. at 339-342.

[9] See R. at 348-349.

[10] See R. at 7-64.

[11] See R. at 7-26.

[12] See R. at 42-48, 55-59.

elements of the claim, and the state claims on various other grounds.

During oral argument on respondents' Motion to Dismiss, the district court concentrated on the alleged predicate acts and alleged resulting injuries. Despite the district court's repeated request for specifics, petitioners' attorney was unable to identify a single predicate act but incredulously averred that an attorney's alleged violation of a fiduciary duty is a **criminal act**.[13] Petitioners' counsel also argued that any breach of contract that involves the U.S. mail is a crime.[14] Similarly, petitioners' counsel was unable to identify any actual damages incurred by petitioners resulting from the alleged RICO violations despite the district court's repeated requests to do so.[15] After reviewing all pleadings and hearing oral argument, the district court correctly ruled that no predicate acts or actual injuries had been specifically pled and dismissed the RICO claim with prejudice.[16] The district court noted that because petitioners could not identify a predicate act despite numerous opportunities to do so, it was pointless to allow them to amend their Complaint.[17] The district court dismissed

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[13] See R. at 630-631, 644-645.

[14] See R. at 631-632.

[15] See R. at 635, 639-640, 646-648.

[16] See R. at 613.

[17] See R. at 672-673.

the pendant state law claims without prejudice and assigned costs to petitioners.[18]

Petitioners appealed to the Fifth Circuit, which affirmed the decision that is the subject of this Petition for Certiorari. Because the Fifth Circuit correctly applied the law to the facts at hand, certiorari should be denied.

REASONS FOR DENYING THE PETITION

Petitioners present several questions for review, as summarized above, concerning the standard of review for dismissing a RICO claim under Rule 12(b)(6) and the district court's discretion in denying amendment to a complaint. Respondent understands petitioners' desire to attract the attention of this Court with important-sounding issues, but this Court has already answered the questions presented and should not waste a precious writ when a case citation will suffice. The standard for dismissing a RICO claim has not changed, i.e. the petitioners must allege a predicate act and actual damages to avoid dismissal. Petitioners have done neither. Further, the district court has the discretion to deny amendment if such an amendment would be futile, which is the case here.

[18] See R. at 613.

I. Petitioners' Requirement to Allege Predicate Acts to Avoid Dismissal of RICO Claim Not Changed by Plausibility Standard

Petitioners assert that the Fifth Circuit deviated from the decisions of other circuits by requiring that petitioners allege predicate acts to avoid dismissal of their RICO claim. Petitioners refer to this supposedly new standard as a "criminal act pleading standard." Petitioners, however, incorrectly confuse the essential elements that must be alleged to maintain a RICO claim with the accepted pleading standards prescribed by the Federal Rules of Civil Procedure. The Fifth Circuit's dismissal of the RICO action is consistent with the jurisprudence and law that dictates the standard for review and the level of specificity that must be pled in a Complaint.

A. U.S. Supreme Court Requires Identification of Predicate Acts to Maintain RICO Claim

Petitioners erroneously argue that the Fifth Circuit has created a "criminal act" pleading standard that conflicts with this and other courts. The Fifth Circuit has not created a new standard of pleading; rather, it required petitioners to follow established law. For over twenty years, this Court has required petitioners to show: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity in order to maintain a RICO claim. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481, 105 S.Ct. 3275 (1985); 18

U.S.C. §1962(c). Thus, the first step in reviewing a RICO claim is to determine whether a predicate act has been pled. *See Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 400, 123 S.Ct. 1057 (2003), *rev'd and remanded on other grounds*, 547 U.S. 9, 126 S.Ct. 1264 (2006). The district court here correctly found that petitioners failed to allege a predicate act in either the Complaint or the RICO Standing Order and, for that reason, it was implausible that petitioners would prevail on their claims. This decision does not deviate from the decisions of other circuits.

Numerous other courts have dismissed RICO claims when there is no showing of predicate acts, even under the more lax pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). *See Ahmed v. Rosenblatt*, 118 F.3d 886 (1st Cir. 1997), *cert. denied sub nom., Ahmed v. Greenwood*, 522 U.S. 1148, 118 S.Ct. 1165 (1998) (plaintiff did not plead mail and wire fraud with sufficient particularity to satisfy predicate acts requirement for civil claim under RICO); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir. 1991) (dismissing RICO complaint for failure to plead predicate acts with specificity); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170 (2d Cir. 1993) (petitioners failed to allege predicate act of mail and wire fraud); *Advocacy Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315 (6th Cir. 1999) (petitioners failed to sufficiently allege mail and wire fraud as predicate acts in support of RICO claims); *Craighead v. E.F. Hutton & Co., Inc.*, 899

F.2d 485 (6th Cir. 1990) (petitioners' claim fatally flawed by their failure to plead the basic elements of the alleged predicate acts of mail fraud with sufficient particularity); *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016 (7th Cir. 1992); *Forkin v. Rooney Pace, Inc.*, 804 F.2d 1047 (8th Cir. 1986) (RICO dismissal upheld because predicate acts not sufficiently pled); *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066 (8th Cir. 1995) (mail and wire fraud allegations were not made with sufficient specificity and RICO claim dismissed); and *Rothman v. Vedder Park Management*, 912 F.2d 315, 316-17 (9th Cir. 1990) (dismissing RICO claim for failure to sufficiently allege predicate acts of mail fraud and extortion). Thus, the Fifth Circuit correctly upheld the district court's dismissal of petitioners' RICO claim because petitioners failed to plead even a single predicate act much less a pattern of mail or wire fraud.

B. Fifth Circuit Did Not Impose Heightened Standard For Pleading

In their brief, petitioners attempt to mislead this Court by stating that their failure to identify hours billed but not worked by Howard was the reason that the RICO claim was dismissed.[19] They further aver that the Fifth Circuit's requirement that petitioners plead predicate acts with specificity "goes far beyond

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[19] See Petition for Writ of Certiorari, p. 11.

any civil pleading standard known" and conflicts with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).[20] Despite petitioners' claim, alleging the essential elements in a complaint of a RICO claim, or any other claim, is not a "matter of serendipity" as they state, but merely good lawyering.[21] The Fifth Circuit applied the correct standard under the Federal Rules of Procedure and the relevant jurisprudence when it upheld the dismissal of petitioners' RICO claim.

Predicate acts supporting a civil RICO claim, which are based on allegations of fraud, must meet the pleading requirements of Fed. R. Civ. Proc. 9(b). *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992) (Rule 9(b)'s particularity requirement "applies to the pleading of fraud as a predicate act in a RICO claim). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind may be averred generally." Fed. R. Civ. Proc. 9(b) particularity, at a minimum, requires a plaintiff to allege the time, place, and the contents of the representation upon which the fraud is based, as well as the identity of the person making the representation, and the objective of the fraud. *Tel-Phonic*, 975 F.2d at 1139; *Bonton v.*

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[20] See Petition for Writ of Certiorari, p. 12.

[21] See Petition for Writ of Certiorari, p. 12.

Archer Chrysler Plymouth, Inc., 889 F.Supp. 995, 1004 (S.D.Tex. 1995). Petitioners alleged numerous facts in their pleadings but none that alleged criminal activity by respondents.

In the civil RICO context, Rule 9(b) also requires petitioners to allege specifically how *each* act of mail or wire fraud furthered the fraudulent scheme, who caused what to be mailed or wired when, and how the mailing or wiring furthered the fraudulent scheme. *Heden v. Hill,* 937 F.Supp. 1230, 1243 (S.D.Tex. 1996). If predicate acts of fraud are not pled with the particularity required by Rule 9(b), civil RICO claims are subject to dismissal. *See e.g., Ahmed v. Rosenblatt,* 118 F.3d at 889 (failure to plead predicate acts of fraud with particularity is enough to justify dismissal of a civil RICO claim); and *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327-30 (7th Cir. 1994) (dismissal of a civil RICO claim was proper when plaintiff failed to allege the predicate acts of mail and wire fraud with the required particularity). Thus, requiring petitioners to plead the alleged acts of fraud with particularity conforms with the requirements of Rule 9(b). Petitioners did not meet this requirement and their RICO claim correctly was dismissed.

C. Complaint Did Not Meet Plausibility Standard

To resuscitate their dismissed claim, petitioners argue a moot point to divert this Honorable Court's

attention from the paucity of factual support for their RICO claim. They incorrectly aver that the Fifth Circuit's failure to apply the plausibility standard conflicts with the Seventh Circuit's decision in *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804 (5th Cir. 1998), which held that a complaint must include as much factual detail as may be requested to show the claim is plausible. Petitioners' argument is factually incorrect and irrelevant.

The district court here, in fact, did apply the plausibility standard when it determined that the Complaint failed to state an actionable RICO claim. The Fifth Circuit upheld this decision and noted that the Complaint did not meet either the plausibility standard stated in *Twombly* or the minimum notice requirement set forth in *Conley*:

> Because Appellants do not meet either the more liberal *Conley* standard or the *Twombly* plausibility standard, we do not need to decide in this instance whether *Twombly* applies in the RICO context.

Petitioners have either missed the point entirely, or have chosen to ignore that the holding in *Twombly* did not alter their obligations under Rule 9(b) to plead all allegations of fraud with specificity. Other circuits have recognized this two-fold obligation to meet the more general plausibility standard **and** plead fraud with specificity. *See U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496 (6th Cir. 2008) ("Such conclusory allegations are insufficient even

under the notice pleading of Rule 8(a), *Bell Atlantic Corp. v. Twombly*, much less the heightened standard of Rule 9(b) which applies to the conspiracy to commit fraud claim) (internal citations omitted); *Impac Warehouse Lending Group v. Credit Suisse First Bostn LLC,* 270 Fed.Appx. 570 (9th Cir. 2008) ("As Rule 9(b)'s express language requires a pleading alleging fraud to state specific facts, applying *Erickson*'s liberal pleading standard would be inappropriate in the instant case, regardless of whether this case involves the kind of "sprawling, costly and hugely time-consuming" litigation which generally triggers *Twombly*'s special pleading rule.).

This two-fold pleading requirement was recently further clarified by the Fifth Circuit who stated

> In cases of fraud, Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later. We apply Rule 9(b) to fraud complaints with "bite" and "without apology," but also aware that Rule 9(b) supplements but does not supplant Rule 8(a)'s notice pleading. Rule 9(b) does not "reflect a subscription to fact pleading" and requires only "simple, concise, and direct" allegations of the "circumstances constituting fraud," which after *Twombly* must make relief plausible, not merely conceivable, when taken as true.

U.S. ex rel. Grubbs v. Kanneganti, ___ F.3d ___, 2009 WL 930071 (5th Cir. Apr 8, 2009).

In the present case, the district court found that petitioners' Complaint did not meet the *Twombly* plausibility standard. The Fifth Circuit did not address whether *Twombly*'s plausibility standard had to be applied because it found that the facts alleged in the Complaint did not even meet the more liberal standard of *Conley*. This does not conflict with the holding in *Limestone* and this absence of conflict among the circuits negates petitioners' reason for this Court's review.

II. Fifth Circuit's Decision Is Consistent with Civil RICO Statute and the Jurisprudence

A. Lack of Predicate Acts Makes Reliance Issue Moot

In its decision, the Fifth Circuit discussed that although the district court noted that detrimental reliance is an element of a RICO claim, reliance is no longer required in cases of fraud.[22] See *Bridge v. Phoenix Bond & Indem. Co.*, 128 S.Ct. 2131, 2139-40 (2008). The Fifth Circuit held that because petitioners did not plead any predicate acts and had no evidence of actual damages, the lack of detrimental reliance was moot:

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[22] The district court did not find reliance or base its dismissal on the lack thereof; the district court dismissed the RICO claim because there were no alleged predicate acts and no proximate causation between the alleged fraud and any actual injury alleged by the petitioners.

> Notwithstanding the fact that reliance is no longer required to be pled, Appellants have still not sufficiently pled the predicate acts of mail and wire fraud, and are unable to show that they were injured by a violation of RICO.

Thus, the issue of detrimental reliance is moot and its mention by the district court does not warrant this Court's review.

B. Alleged Ethics Violations Not Predicate Acts Under RICO

All of the so-called predicate acts alleged by petitioners are nothing more than possible ethics violations – not crimes. In fact, the Office of Disciplinary Counsel recently dismissed two complaints filed by one petitioner and another filed by her attorney-of-record, Mark E. Andrews, because the complained-of actions, which also form the basis for this RICO claim, did not violate the Louisiana Code of Professional Responsibility. (See Appendix "A").

To side-step this relevant fact, petitioners erroneously infer in their Brief that the Fifth Circuit played favoritism and found no predicate acts simply because the respondents are attorneys. Petitioners' unfounded inference is misleading and inflammatory. In support, they cite language from an Eighth Circuit case that is irrelevant here. Despite petitioners' assertion, the Fifth Circuit's dismissal does not conflict with the Eighth Circuit as the facts have nothing in

common and are, therefore, distinguishable. Indeed, petitioners' mere lifting of an isolated sentence from the holding in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997), does not create a "conflict."

In *Handeen*, Handeen had obtained a substantial monetary judgment from Lemaire for injuries Handeen sustained when Lemaire tried to kill him. Subsequently, Handeen sued Lemaire and his law firm for manipulating the bankruptcy system by creating fictitious debt for Lemaire in order to obtain a fraudulent discharge of Handeen's judgment. Handeen sued the law firm for RICO violations based upon its alleged participation in this fraudulent scheme. The district court dismissed the law firm on summary judgment but the appellate court reversed because there was sufficient evidence that the firm had participated in the operation or management of the RICO enterprise. The court then distinguished this from other cases in which attorneys merely provided advice, which did not bring them under the RICO definition of an "enterprise."

Thus, *Handeen* differs significantly from the case at hand because there was a finding of predicate acts and the only issue was whether the law firm had been an "insider" or "outsider" for purposes of determining their involvement in the management or operation of the RICO enterprise. In the present case, the RICO claim was dismissed because petitioners made no showing that predicate acts had been committed by respondents or that petitioners sustained any actual injury.

The occupation of the respondents was irrelevant to the holding and petitioners have supplied no facts to the contrary. The district court questioned respondents' counsel during oral argument as to when an ethics violation committed by an attorney would be a predicate offense. Howard's counsel noted that a predicate offense could be a subset of ethics violations. That is, an ethics violation by an attorney is a predicate offense only when the violation is also criminal. Petitioners have never accepted this distinction despite numerous courts' admonition on this point. Because there is no conflict between the circuits on the standard of proof required to maintain a RICO action against attorneys and/or a law firm, i.e. the need to show predicate acts, the Fifth Circuit's decision need not be reviewed by this Court, and certiorari should be denied.

III. District Court Not Required to Allow Amendment if Futile

Fed. R. Civ. Proc. 15(a) allows "[a] party [to] amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . ." Because a motion to dismiss is not a responsive pleading, petitioners were not required to seek leave to amend. Nonetheless, they never amended their Complaint even when its deficiencies were the focal point of respondents' Rule 12(b)(6) Motion to Dismiss. Instead, petitioners sought leave to amend at the conclusion of their oral argument on the Rule 12(b)(6) Motion to Dismiss. See *Crestview Village Apartments*

v. U.S. Dept. of Housing and Urban Development, 383 F.3d 552 (7th Cir. 2004) (final judgment dismissing case causes plaintiff to lose right to amend). Thus, their right to amend without leave had been waived. The district court exercised its discretion and properly denied petitioners' requested leave to amend as amendment would have been futile.

A. District Court's Denial of Amendment Was Appropriate

A trial court is required to give leave to amend "when justice so requires." Fed. R. Civ. Proc. 15(a); *Meyer v. Foti*, 720 F.Supp. 1234, 1239 (E.D.La. 1989). Whereas Fed. R. Civ. Proc. 15(a) " 'evidences a bias in favor of granting leave to amend,' [such leave] is not automatic." *Matter of Southmark Corp.*, 88 F.3d 311, 314 (5th Cir. 1996), quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981), *cert. denied*, 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 611 (1997). In deciding whether to allow amendment, a district court "may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Id.* The grant or denial of an opportunity to amend is in the discretion of the court, but it would be abuse of discretion without any justifying reasons. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962). In the present case, the appellate court correctly found no abuse of discretion by the district court because it

stated its reasons, orally and in writing, for denying amendment.

The district court weighed the above factors and concluded that it would be futile to allow petitioners leave to amend because they had had three opportunities to state their best case and still could not articulate a plausible claim under RICO. Even during the oral argument, petitioners were unable to identify a single predicate act committed by any defendant or state how they had suffered any actual damages as result of the alleged violations. Counsel for petitioners admitted during the hearing that "[w]e tried to put everything that we had into the complaint. There was little else to add in the RICO Case Statement."[23] Instead of identifying criminal activity, petitioners merely continued to proffer the erroneous premise that a possible ethics violation is equivalent to a criminal act.

Petitioners incorrectly contend that the district court gave no reason for refusing them leave to amend. This contention is disingenuous because petitioners admit in their writ that the district court's written reasons stated that petitioners' repeated failure to allege a claim was why it denied leave to amend. The Fifth Circuit noted that petitioners had several opportunities to state their best case, found no abuse of discretion in the lower court's reasoning, and affirmed the district court's denial of petitioners'

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[23] See R. at 636, T 21:21-25.

motion to amend. *St. Germain v. Howard*, 556 F.3d 261 (5th Cir. 2009) (citing *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (finding no abuse of discretion in district court's denial of opportunity to amend when petitioners had already filed their original complaint, their RICO case statement, and their response to respondents' Rule 12(b)(6) motion)).

Petitioners argue that they were never given an opportunity to amend and, thus, should have been allowed to do so. Notwithstanding that any amendment would have been futile, their argument is misleading because they filed a RICO Case Statement which several courts consider an amendment to the original Complaint and/or can be weighed in deciding a dispositive motion. *See Costello v. Norton*, 1998 WL 743710 (N.D.N.Y. Oct 21, 1998) (RICO Case Statement is an amendment of Complaint); *McDonald v. Heaton*, 2006 WL 2090088 (W.D. Okla. Jul 25, 2006); *Perlberger v. Perlberger*, 1997 WL 597955 (E.D. Pa. Sep 16, 1997) (RICO Case Statement treated as amendment); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1107 (5th Cir. 1990) (filing of RICO Case Statement allows consideration of claim without further amendment and Statement considered in motion for summary judgment); *RA Investments I, L.L.C. v. Deutsche Bank AG*, 2005 WL 1356446 (N.D. Tex. Jun 6, 2005) (RICO Case Statement was considered when dismissing RICO claim); *Price v. Pinnacle Brands, Inc.*, 138 F.3d at 605 (case statement considered in motion to dismiss); *Word of Faith World Outreach Center*

Church, Inc. v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996), *cert. denied*, 520 U.S. 1117, 117 S.Ct. 1248 (1997) (case statement reviewed in motion to dismiss); and *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993) (RICO Case Statement is a pleading to be considered when deciding motion to dismiss). Petitioners could have amended their Complaint anytime before judgment had been entered, but they did not.

As the district court correctly noted, after having numerous opportunities to amend their complaint, petitioners were unable to identify any predicate acts, much less a pattern of such acts, and could not specify any actual damages suffered by petitioners. Therefore, any further amendment would have been futile. The Fifth Circuit correctly affirmed the decision to deny amendment under these facts.

B. Fifth Circuit Decision Does Not Conflict With Other Circuits

Petitioners aver that this Court's review is warranted because the Fifth Circuit's denial of amendment conflicts with "all other circuits" and then cites two cases from the Third and Seventh Circuits in support. The Seventh Circuit case is clearly distinguishable. In *Foster v. DeLuca*, 545 F.3d 582 (7th Cir. 2008), the appellate court reversed the district court's denial of amendment because the district court gave no reasons for its decision. *Id.* at 585. Here, the district court denied the oral request to amend stating that petitioners had had several

opportunities to make their case, and amending would not cure their lack of factual support for the RICO claims. Indeed, in their appeal, petitioners still could not identify any criminal activity by respondents; rather, petitioners stated that they wanted to amend so that they could re-organize their complaint. However, no amount of re-organization can overcome the deficiencies inherent in their claim.

The Third Circuit case cited by petitioners is equally distinguishable. In *Arthur v. Maersk, Inc.*, 434 F.3d 196 (3d Cir. 2006), the district court denied petitioners request to amend an admiralty complaint to add the United States Navy as a defendant. The amendment would have related back to the original filing and revived what appeared to be a claim for which the statute of limitations had run. The district court denied amendment because the request had been delayed unduly because plaintiff should have known of the Navy's ownership of the vessel in question. The appellate court noted that the reasons given made it clear that the district court had applied the requisites for relating back under Rule 15(c) instead of the Rule 15(a) requirements for amendment. Futility of amendment was never at issue in *Arthur*, and the case has no relevance to the issues at hand.

In fact, petitioners' averment that the Fifth Circuit's holding conflicts with the Third Circuit is undercut by *Anderson v. Ayling*, 396 F.3d 265 (3d Cir. 2004). In *Anderson*, two union members alleged a RICO violation against union activists. The district

court dismissed the RICO claim with prejudice finding no direct injury resulted from the alleged acts and did not allow them to amend the complaint. The appellate court upheld the lower court's dismissal and denial of amendment. The appellate court agreed that the amendment would be futile as petitioners could not allege facts sufficient to show causation of injury.

In addition, petitioners' claim that the Fifth Circuit's decision conflicts with "all other circuits" is factually incorrect. For example, in *Allen Neurosurgical Associates, Inc. v. Lehigh Valley Health Network*, 2001 WL 41143 (E.D.Pa. Jan 18, 2001), a case much more on point than the two cited by petitioners above, the Court denied petitioners' motion to amend a RICO complaint because, as here, plaintiff had an opportunity to refine his Complaint by filing a RICO Case Statement in addition to the Complaint. The *Allen* Court stated that "granting leave to amend would be futile because plaintiff's claims are essentially state claims that are not predicate acts of racketeering under RICO." The same reasoning was applied here with the same correct result. *See also U.S. ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730 (7th Cir. 2007) (amendment denied because allegations of fraud not pled with specificity making amendment would be futile); *Fultz v. ABB Power T&D Co., Inc.*, 210 F.3d 374 (7th Cir. 1999), *cert. denied sub nom., Fultz v. ABB Power T&D, Inc.*, 531 U.S. 1080, 121 S.Ct. 781 (2001) (amendment denied as futile); *Anderson v. Ayling*, 396 F.3d 265 (amendment of RICO claim denied as

futile); *Bozeman v. Rochester Telephone Corp.*, 205 F.3d 1321 (2d Cir. 2000), *cert. denied*, 531 U.S. 850, 121 S.Ct. 124 (2000) (given information provided in RICO Case Statement, district court denial of amendment, because it would have been futile, was not abuse of discretion); *McDonald v. Heaton*, 2006 WL 2090088 (lack of facts in RICO Case Statement to support claim demonstrates that amendment would be futile); *Dumas v. Major League Baseball Properties, Inc.*, 104 F.Supp.2d 1220 (S.D.Ca. 2000), *aff'd sub nom., Chast v. Fleer/Skybox Intern.*, 300 F.3d 1083 (9th Cir. 2002) (court denied leave to amend where petitioners failed to allege actual injury or "even a scintilla of fraudulent conduct by Respondents"). The Fifth Circuit correctly upheld the district court's denial of leave to amend because that ruling was not an abuse of discretion under the facts at hand.

CONCLUSION

Petitioners' petition states no compelling reason why this Court should grant a writ of certiorari. The decision of the Fifth Circuit does not conflict with a decision of another court of appeal, has not decided an important federal question that conflicts with a decision of the Louisiana Supreme Court, and has not in any way deviated from accepted judicial proceedings as to warrant this Court's supervision. To the contrary, the Fifth Circuit's opinion analyzed every issue under the correct legal standard of review. Petitioners simply did not, and could not, allege any

criminal acts by respondents or actual injuries suffered by petitioners. That failure mandated dismissal of their RICO claim. Also, the Fifth Circuit correctly found that because petitioners had three opportunities to allege a crime and could not, the district court correctly exercised its discretion by denying petitioners' leave to amend.

Petitioners' dissatisfaction with the Fifth Circuit's decision does not warrant review by this Court: "A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[24]

Respectfully submitted,

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[24] Rule 10 of the Rules of the Supreme Court.